

2401 MISREPRESENTATION: INTENTIONAL

To constitute intentional misrepresentation, there are five elements¹ which must be proved by (plaintiff).

First, that (defendant) made the representation of fact. Representations of fact do not have to be in writing or by word of mouth, but may be by acts of conduct on the part of (defendant) [,or even by silence if there is a duty to speak. A duty to speak may arise when information is asked for; or where the circumstances would call for a response in order that the parties may be on equal footing; or where there is a relationship of trust or confidence between the parties²].

An expression of opinion which either indicates some doubt as to the speaker's belief in the existence of a state of fact, or merely expresses the speaker's judgment on some matter, such as quality, value, authenticity and the like, does not constitute a representation of fact.³ However, a statement of opinion, which carries with it an implied assertion that the speaker knows that the facts exist which support the speaker's opinion, may, in your discretion, be determined by you to be a representation of fact.⁴ In making your determination, you may consider the form and manner of expression⁵ [or the disparity of knowledge between the parties of the underlying facts;⁶ or the existence of a trust or confidence relationship between the parties⁷].

Second, that the representation of fact was untrue.

Third, that such untrue representation was made by (defendant) knowing the

representation was untrue or recklessly without caring whether it was true or false. Representations made by a person who knows that he or she has no sufficient basis of information to justify them are reckless.⁸

Fourth, that (defendant) made the representation with intent to deceive and induce (plaintiff) to act upon it to (plaintiff)'s damage.⁹

Fifth, that (plaintiff) believed such representation to be true and relied on it.¹⁰ [It is not necessary that the representation made be of such character as would influence the conduct of a person of ordinary intelligence and prudence.¹¹] Representations are to be tested by their actual influence on the person to whom they are made [not upon the probable effect of such representation upon some other person¹²]. In determining whether (plaintiff) actually relied upon the representation, the test is whether (plaintiff) would have acted in the absence of the representation.¹³ It is not necessary that you find that such reliance was the sole and only motive inducing (plaintiff) to enter into the transaction. If the representation was relied upon and constitute a material inducement, that is sufficient.¹⁴

If you find, however, that (plaintiff) or the person to whom the representation was made knew it to be untrue, then there can be no justifiable reliance as no one has the right to rely upon representation that he or she knew was untrue.¹⁵

Nor can there be justifiable reliance if (plaintiff) relied on a representation which (plaintiff) should have recognized as preposterous or which is shown by facts within (his) (her) easy observation and (his) (her) capacity to understand to be obviously untrue.¹⁶

(Plaintiff) is not required before relying upon the representation of fact to make an independent investigation.¹⁷

SPECIAL VERDICT

Question 1: Did (defendant) make the representation of fact as to _____?
(State the ultimate facts alleged to be relied on.)

Answer: _____

Yes or No

Question 2: If you answer “yes” to question 1, answer this question:

Was the representation untrue?

Answer: _____

Yes or No

Question 3: If you answered “yes” to both questions 1 and 2, answer this question:

Did (defendant) make the representation knowing it was untrue or recklessly without caring whether it was true or untrue?

Answer: _____

Yes or No

Question 4: If you answered “yes” to question 3, answer this question:

Did (defendant) make the representation with the intent to deceive and induce (plaintiff) to act upon it?

Answer: _____

Yes or No

Question 5: If you answered all the preceding questions “yes,” answer this question:

Did (plaintiff) believe such representation to be true and justifiably rely on it to (his) (her) financial damage?

Answer: _____

Yes or No

Question 6: If you answered all the preceding questions “yes,” answer this question:

What sum of money will fairly and reasonably compensate (plaintiff)
for (his) (her) financial damage?

Answer: \$ _____

NOTES:

1. Malzewski v. Rapkin, 2006 WI App 183, ¶17, 296 Wis. 2d 98, 723 N.W.2d 156.
2. John Doe 1 v. Archdiocese of Milwaukee, 2007 WI 95, ¶42, 303 Wis. 2d 34, 734 N.W. 2d 827; Van Lare v. Vogt, 2004 WI 110, ¶33, 274 Wis.2d 631, 683 N.W. 2d 46; Novell v. Migliaccio, 2010 WI App 67, ¶10, 325 Wis. 2d 230, 783 N.W. 2d 897 (Ct App 2010); Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W.2d 510 (1943); 37 Am.Jur. Fraud and Deceit §§ 144-147 (1941); Killeen v. Parent, 23 Wis.2d 244, 127 N.W.2d 38 (1964).
3. Bentley v. Foyas, 260 Wis. 177, 5 N.W.2d 404 (1952). See also United Concrete & Construction v. Red-D-Mix Concrete, Inc., 2013 WI 72, 833 N.W.2d 714.
4. 37 Am.Jur.2d Fraud and Deceit §§ 49, 77 (1968); “Opinions may be statements of fact if the representee may rely on them without being guilty of a want of ordinary care and prudence.” Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).
5. J. H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906).
6. Neas v. Siemens, 10 Wis.2d 47, 102 N.W.2d 259 (1960); Madison Trust Co. v. Helleckson, 216 Wis. 443, 257 N.W. 691 (1934); Kraft v. Wodill, 17 Wis.2d 425, 431, 117 N.W.2d 261 (1962).
7. Karls v. Drake, 168 Wis. 372, 170 N.W. 248 (1919); Miranovitz v. Gee, 163 Wis. 246, 157 N.W. 790 (1916); Tietzworth v. Harley-Davidson, Inc., 2004 WI 32, 270 Wis.2d 146, 677 N.W.2d 233, ¶ 13.

8. Stevenson v. Barwineck, 8 Wis.2d 557, 99 N.W.2d 690 (1959); Bachman v. Salzer, 168 Wis. 277, 169 N.W. 279 (1919); Prosser, Law of Torts (3d) § 102 at 716 (1964); Tietsworth v. Harley-Davidson, Inc., supra, ¶ 13.

9. Malzewski v. Rapkin, supra note 1; Household Finance Corp. v. Christian, 8 Wis.2d 53, 98 N.W.2d 390 (1959); Cluskey v. Thranow, 31 Wis.2d 245, 142 N.W.2d 787 (1966).

10. Household Finance Corp. v. Christian, supra note 9.

11. Miranovitz v. Gee, supra note 7.

12. Neas v. Siemens, supra note 6.

13. Laehn Coal and Wood Co. v. Koehler, 267 Wis. 297, 64 N.W.2d 823 (1954); Prosser, Law of Torts (3d) § 103 at 729 (1964).

14. Household Finance Corp. v. Christian, supra note 9; First National Bank of Oshkosh v. Scieszinski, 25 Wis.2d 569, 131 N.W.2d 308 (1964).

15. Household Finance Corp. v. Christian, supra note 9.

16. Prosser, Law of Torts (3d) § 103 at 731 (1964). Plaintiff must give ordinary attention to facts easily within his purview, Kraft v. Wodill, 17 Wis.2d 425, 430, 117 N.W.2d 261 (1962); Plaintikow v. Wolk, 190 Wis. 218, 222, 208 N.W. 922 (1926). To succeed on a claim for fraudulent misrepresentation, the representation must be a fact and made by the defendant, the representation must have been false, and the plaintiff must have believed the representation was true and relied on it to his damage. Foss v. Madison Twentieth Century Theaters, 203 Wis.2d 210, 551 N.W.2d 862 (Ct. App. 1996), citing Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969). In Foss, the court said that the law will not permit a person to predicate damage upon statements which he or she does not believe to be true, for if he or she knows they are false, it cannot be said that he or she is deceived by them. Citing First Credit Corp. v. Behrend, 45 Wis.2d 243, 172 N.W.2d 668 (1969). The court said no one has the right to rely on representations he or she knows to be untrue.

17. Restatement, Second, Torts, §§ 540, 541 (1938). Constructive notice of recording acts do not apply to misrepresentations. Schoedel v. State Bank of Newburg, 245 Wis. 74, 13 N.W.2d 534 (1944); 152 A.L.R. 459 (1944).

COMMENT

This instruction and comment were approved by the Committee in 1969. The comment was revised in 1997, 2001, 2004, 2014, 2016, 2017, and 2018. This revision was approved by the Committee in September 2022; it added to the comment.

For burden of proof, see Wis JI-Civil 205.

For punitive damages, see Wis JI-Civil 1707.1.

Short form of ultimate fact (as used in Combined Verdict: Deceit or Negligence) was approved in Rud v. McNamara, 10 Wis.2d 41, 47, 102 N.W.2d 248 (1960), because: “Too many inquiries tend to confuse juries.”

Intentional Misrepresentation to Induce Continued Employment. The Wisconsin Supreme Court has refused to recognize a new cause of action for intentional misrepresentation to induce continued employment. Mackensie v. Miller Brewing Co., 2001 WI 23, ¶ 21, 241 Wis.2d 700, 623 N.W.2d 739.

Rescission. Rescission is a remedy for intentional misrepresentation claims. Whipp v. Iverson, 43 Wis.2d 166, 168 N.W.2d 201, (1969); Mueller v. Harry Kaufmann Motorcars, Inc., 2015 WI App 8, 359 Wis.2d 597, 859 N.W.2d 451. The misrepresentation must be material. Bank of Sun Prairie v. Esser, 155 Wis.2d 724, 456 N.W.2d 585 (1990); Mueller, *supra*.

Pecuniary. The Committee changed “pecuniary” to “financial” for plain language purposes.

Circumstantial evidence used to establish actual reliance. Wisconsin law does not require direct evidence to prove elements of every cause of action. See WIS JI—CIVIL 230. Furthermore, Wisconsin law permits the use of circumstantial evidence to establish actual reliance upon the representation as required by element five. See Beuttler v. Marquardt Management Services, Inc., 2022 WI App 33, 404 Wis.2d 116, ¶30, 978 N.W.2d 237. The burden of proof on summary judgment “...can also be met by reasonable inferences drawn from circumstantial evidence.” Techworks, LLC v. Wille, 2009 WI App 101, 318 Wis. 2d 488, ¶2, 770 N.W.2d 727.